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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. ~~1351~~ 219

WILLIE JACKSON, *Petitioner*

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No.

WILLIE JACKSON, *Petitioner*

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on November 16, 1965, rehearing of which was denied on May 11, 1966.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 352 F. 2d 490. It is set forth in the Appendix, pages 1a through 2a.

The opinion of the United States District Court for the Middle District of Georgia, Macon Division, is not reported, but appears in the record, pp. 121-127.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was rendered on November 16, 1965 (App. 3a). Rehearing was denied on May 11, 1966 (App. 4a). Issuance of the mandate pursuant to the judgment was stayed for a period of thirty (30) days on May 23, 1966, dating from May 11, 1966. The jurisdiction of this Court is invoked pursuant to 28 United States Code, Section 1254(1).

QUESTIONS PRESENTED

1. Where petitioner is arrested by state officers in violation of state law for allegedly operating a motor vehicle on a suspended license upon their bare recollection that petitioner's license had been suspended, did the officers have probable cause to arrest so as to justify a search of petitioner's vehicle for evidence of a violation of federal law under the Fourth and Fourteenth Amendments?

2. Assuming probable cause for the arrest, under the Fourth and Fourteenth Amendments, may evidence obtained in violation of a state statute be used in a federal prosecution?

3. May state officers consistent with the Fourth and Fourteenth Amendments search a motor vehicle contemporaneously with an arrest for a violation of state traffic laws where the exigencies justifying a warrantless search are absent?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourth and Fourteenth Amendments to the Constitution of the United States.

This case also involves the following Georgia Statutes:

GEORGIA CODE ANNOTATED, SECTION 27-207:

> 27-207 (917 P. C.) Arrest without warrant. An arrest for a crime may be made by an officer, either under a warrant, or without a warrant if the offense is committed in his presence, or the offender is endeavoring to escape, or for other cause there is likely to be a failure of justice for want of an officer to issue a warrant.

GEORGIA CODE ANNOTATED, SECTION 68-1707 (1953):

> 68-1707. Marking of official vehicles.—Any motor vehicle which is used on official business by any person authorized to make arrests for traffic violations in this State, or any municipality or county thereof, shall be distinctly marked on each side and the back with the name of the agency responsible therefor, in letters not less than six inches in height. (Acts 1953, Nov. Sess., pp. 556, 605.)

GEORGIA CODE ANNOTATED, SECTION 68-1701(a) (1953):

> 68-1701. Scope and effect of regulations as to equipment.—(a) It is a misdemeanor for any person to drive or move or for the owner to cause or knowingly permit to be driven or moved on any street or highway any vehicle or combination of vehicles which is in such unsafe condition as to endanger any person, or which does not contain those parts or is not at all times equipped with such lamps and other equipment in proper condition and adjustment as required in sections 68-1701 through 68-1722, or which is equipped in any manner in vio-

lation of said sections, or for any person to do any act forbidden or fail to perform any act required under said sections. . . . (Acts 1953, Nov. Sess., pp. 556, 602).

GEORGIA CODE ANNOTATED, SECTION 92A-422 (1951):

92A-422. Refusal, suspension, revocation, or cancellation of license; hearing.—Upon the refusal, suspension, revocation, or cancellation of any learner's, special learner's, operator's or chauffeur's license for cause, a hearing shall be granted on demand before any agent of the Department of Public Safety authorized by the Director to hear the same, which hearing shall be had in the county of such person's residence, and need not be a matter of record.

. . . (a) Suspension means that the licensee's privilege to drive a motor vehicle is temporarily withdrawn . . . (Acts 1937, pp. 322, 349; 1939, pp. 135, 143; 1943, pp. 196, 201; 1951, pp. 598, 604.)

GEORGIA CODE ANNOTATED, SECTION 92A-423 (1951):

92A-423. Same; appeared to court.—The decision of such agent or officer of the Department of Public Safety shall be final unless the person whose license has been suspended, revoked or cancelled shall desire an appeal, in which case he shall have the right to enter an appeal to the court of the county of his residence, other than a justice's court, having jurisdiction of misdemeanor cases, after notice to the Director, in the same manner as appeals are entered from the court of ordinary, except that he shall not be required to pay the costs in advance. (Acts 1937, pp. 322, 349; 1943, pp. 196, 201; 1951, pp. 598, 605.)

GEORGIA CODE ANNOTATED, SECTION 92A.427.1. Reinstatement of suspended license.—Upon the recommendation of the judge of the court that sus-

pended the operator's or chauffeur's license of any person, the Director of the Department of Public Safety is authorized to reinstate such license. (Acts 1941, pp. 277, 278; 1943, pp. 196, 201; 1951, pp. 598, 606.)

STATEMENT OF THE CASE

WILLIE JACKSON, petitioner, was indicted on February 3, 1964 by the Grand Jury of the United States District Court for the Middle District of Georgia, Macon Division, for alleged violations of 26 United States Code, Sections 5205(a)(2), 5604(a) (R. 1,2). The indictment was in two counts, transportation and possession of non-taxpaid or "moonshine" whiskey.

For several months prior to the events of Sunday, November 3, 1963, plainclothes detectives Jesse Roland and Lonnie R. Brown of the Police Department of the City of Macon, Georgia, who patrolled in an unmarked 1963 Plymouth, had adopted and pursued a policy of stopping, and searching, without a search warrant, any vehicle owned or connected with the petitioner (R. 22, 87-93, 103, 110-112). They pursued this policy because of petitioner's alleged "reputation" as a dealer in "moonshine" whiskey (R. 19). Petitioner, however, had no previous convictions for dealing in "moonshine" whiskey (R. 21).

Roland and Brown were assigned to the vice squad. Seventy-five percent or more of their time was spent making investigations and arrests for moonshine liquor violations (R. 18). They had no connection with the Federal Government and their powers of arrest as officers were derived from the laws of the State of Georgia. They could arrest without a warrant under Section 207, 27 Georgia Code Annotated, for an of-

fense committed in their presence and in two other situations not relied upon to sustain the validity of the arrest and search on Sunday, November 3, 1963.

About seven (7:00) o'clock in the morning, the officers left the police station at City Hall and proceeded on patrol in their unmarked Plymouth (R. 22). Approaching the intersection of Elm and Telfair Streets, they saw the petitioner alone in a red and white two-door Ford traveling in the opposite direction along Telfair Street (R. 28, 30). As petitioner's car came down an incline about a block away, Officer Roland said, "That looks like Stokey (petitioner's nickname) driving that car there" (R. 30). Officer Brown replied, "Sure does" (R. 30). There, they agreed to stop him (R. 31), even though he was not violating any local ordinances (R. 30).

Petitioner turned right off of Telfair Street on to Edgewood Avenue, an unpaved street (R. 31). The tires of his car spun, and a vapor of dust arose (R. 31). The detectives turned and pursued the petitioner with the intention "to catch him for violating the state motor vehicle law" (R. 32). The officers did not know at that time whether petitioner's license had been revoked or suspended (R. 35).

After following petitioner for several blocks, the officers turned on their siren (R. 36) and continued the chase at high speed (R. 41). Detective Roland testified that as the petitioner's car negotiated a curve about two miles from the point at which the chase began, he could "tell the door opened on the right hand side," and "this case went rolling down the street and glass was breaking and liquid running on the street" (R. 44).

Roland and Brown did not stop to determine the nature of the liquid substance (R. 45). They turned sharply in another direction (R. 45, 46) to take advantage of what the trial judge described as "the shorter distance of the hypothenuse as against the two other sides of a triangle" (R. 123). Despite the fact that Brown was puffing away on his cigar, Roland claimed, "there was a smell" (R. 45, 46).

The chase continued for several blocks with the officers "right on [petitioner's] tail" (R. 47). Petitioner's car ran through a driveway into a field and stopped (R. 47, 48). The unmarked Plymouth bumped into the rear of petitioner's car (R. 48). Petitioner got out and moved about ten or fifteen feet from his car (R. 48, 123). Officer Roland got out and bellowed, "Hold it Stokey" (R. 48, 124). Petitioner stopped. The officers placed petitioner in their unmarked Plymouth and then searched his car (R. 48, 65, 66, 114, 124).

Detective Roland, on cross examination, described the search with particularity:

> "Q. And which one of you opened the back of the car, Mr. Brown or you?
>
> A. No, when he got out of the car to abandon it they left a door open and I was the first one up there and you could see a case setting on the back floorboard. Wasn't in the back of the car. It was in the back floorboard.
>
> Q. Was it an open case?
>
> A. The case was closed. I don't know whether it was Atlas or Mason, but one of the two. I recognized it as being a case of half gallon fruit jars.
>
> Q. Half gallon fruit jars?
>
> A. I recognized it being a case, yes sir.

Q. A case in which half gallon fruit jars come?
A. Yes sir.
Q. And what was in it then, you didn't at that moment, have any idea, did you?
A. I knew in my own mind what was in it, yes sir.
Q. You knew in your own mind what was in there?
A. Yes sir.
Q. And then you went on in there and opened it up and verified what was in it, didn't you?
A. Well, we were arresting him for no driver's license" (R. 48, 49).

No effort was made to procure a warrant by car radio during the chase (R. 52). Any of the clerks of court could have issued a warrant, though it was Sunday (R. 53).

Prior to petitioner's arrest, Detectives Roland and Brown had booked "some few" traffic cases (R. 50). Yet, they "were stopping [petitioner] for the driver's license," and "as a result of this arrest, charged him with violating the Alcohol Control [Act]" (R. 55, 107).

A complaint for violation of the Internal Revenue Code was sworn out against petitioner on Monday, November 4, 1963 by William W. Williams of the Alcohol and Tobacco Tax Division of the Internal Revenue Service (R. 3, 4). The sworn complaint was based, in part, upon the factual allegation that certain named state officers had arrested Willie "Stokey" Jackson for driving at a time they "knew that [his] driver's license had been *revoked* . . ." (R. 4, 5).

At the time of the arrest, the detectives did not ask Jackson whether he had a license or not (R. 107, 113).

At the trial, Roland testified from written notes that he was present in Recorder's Court on June 5, 1963 (R. 33, 103), when petitioner's license was allegedly suspended for one year. The Government introduced a certified copy of the conviction and sentence of suspension which showed that the trial before the Recorder was on May 31, 1963 (R. 92; Exh. G-1). The trial judge overruled petitioner's motion to strike the testimony relating to whether or not his license had been suspended on the grounds that the Government had not proved that petitioner's license was still suspended on the date of the arrest. (R. 119).

Petitioner has never been formally charged with violating the state whiskey laws, and the ordinances of the City of Macon respecting "moonshine" whiskey had been declared unconstitutional by the county superior court prior to petitioner's arrest (R. 115). The Government failed to prove whether formal charges were ever brought for the alleged traffic offense (R. 117). A state arrest warrant was not taken out for either the traffic or whiskey charge. Petitioner was held more than forty-eight (48) hours before he was booked. (R. 108, 119).

Prior to trial, petitioner moved to suppress the evidence on the grounds that it was obtained as a result of an illegal search and seizure in violation of his constitutional rights (R. 11-14). The District Judge, after a hearing on April 16, 1964, orally overruled the motion to suppress from the bench (R. 15, 93).

Thereafter, petitioner waived jury trial and agreed for the case to be tried before the Court without a jury (R. 15).

Petitioner entered a plea of not guilty and the case came on for trial before District Judge W. A. Bootle on July 24, 1964.

The District Court held that the search and seizure was valid because it was (1) incident to a lawful arrest, and (2) because of the ambulatory nature of the motor vehicle (R. 126), citing *Rhodes* v. *United States,* 224 F. 2d 348 (5th Cir. 1955) and *Carroll* v. *U. S.* 267 United States 132 (1925). The District Court refused to construe Section 1707, 68, Ga. Code Ann., prohibiting arrests for traffic offenses in unmarked patrol cars, to require exclusion of the evidence seized from petitioner's car (R. 127).

The Court of Appeals held that the search was incident to a valid arrest for a misdemeanor committed in the presence of the seizing officers and that the specific finding of the District Court was, on the record, clearly not erroneous (App. 2a).

Petitioner, on November 24, 1965, filed a motion for rehearing raising the objection that the arrest for the traffic misdemeanor was on bare suspicion and illegal in any event because policemen in unmarked patrol cars are prohibited under penalty of criminal sanction from making arrests for traffic violations. The Court of Appeals held the motion for rehearing for five and a half months and, on May 11, 1966, denied it without comment (App. 4a).

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with the decisions of this Court requiring a warrantless search of a motor vehicle to be preceded by an arrest based upon probable cause. *Carroll* v. *United States, supra; Scher* v.

United States, 305 U.S. 251 (1938); *Brinegar* v. *United States,* 338 U.S. 160 (1949); *Preston* v. *United States,* 376 U.S. 364 (1964).

The validity of the arrest must be tested by state law. *United States* v. *Di Re,* 332 U.S. 581 (1948). Under state law, the arresting officer must *know* that a crime is actually being committed in his presence. He has no authority upon bare suspicion or upon mere information derived from others to arrest a citizen and search, even for concealed weapons. *Pickett* v. *State,* 99 Ga. 12, 15 (1896).

"Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *Brinegar* v. *United States, supra,* at 175, 176; *Carroll* v. *United States, supra,* at 162. Information that the license was suspended was insufficient (in itself) to make out probable cause for the arrest. Corroboration was required; evidence that the license had not been reinstated. By statute, a suspended license may be reinstated (1) by an officer of the Department of Public Safety or (2) upon the recommendation of the judge imposing the sentence of suspension, *supra,* pp. 4, 5. One of the officers testified that he himself had no knowledge of reinstatement proceedings (R. 122). However, since reinstatement proceedings are not matters of record by statute, the officer could have no knowledge of probable cause without inquiring as to whether petitioner possessed his license. Such inquiry was made neither prior to the arrest nor at any time subsequent, *supra,* p. 9.

Facts ascertained after the arrest and search are not relevant. "When the constitutional validity of an arrest is challenged, it is the function of the court to determine whether the facts available to the officers at the moment of the arrest would 'warrant a man of reasonable caution in the belief' that an offense has been committed." *Beck* v. *State of Ohio,* 379 U.S. 89, 96 (1964).

2. The decision of the court below is in direct conflict with the decision of this Court in *Elkins* v. *United States,* 364 U.S. 206 (1960). *Elkins* overturned the so-called "silver platter" doctrine, and held that "evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment is inadmissible . . . ." *Elkins* v. *United States, supra,* at 223.[1]

The arresting officers acted *flagrante delicto.* State law specifically prohibits them from arresting for traffic violations in an unmarked car, *supra,* p. 3. They disclaim probable cause to arrest for violation of the state alcohol control law[2] an rely entirely upon the arrest for an alleged traffic violation. "Decency, security and liberty alike demand that Government officials shall be subjected to the same rules of conduct

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[1] Regardless of whether a warrantless search following an arrest in violation of a state statute constitutes wrongful deprivation of a constitutionally protected right, this Court, as in *Elkins,* may nevertheless exercise its supervisory jurisdiction to review the decision below. But consider *Monroe* v. *Pape,* 365 U.S. 167 (1961).

[2] There was testimony that an informant did relate that petitioner's vehicle was being used to transport whiskey (R. 23). Even if the officers had asserted a claim that the arrest and search was for whiskey, they nevertheless, under *Draper* v. *United States,* 358 U.S. 307 (1959), could not have established probable cause.

that are commands to the citizens," Mr. Justice Brandeis dissenting in *Olmstead* v. *United States*, 277 U.S. 438, at 485 (1928).

The decision below is clearly an "inducement to subterfuge and evasion with respect to federal-state cooperation in criminal investigation" *Elkins* v. *United States, supra,* at 222. The arrest and search are wholly devoid of good faith. The arresting officers have yet to institute formal prosecution in the state courts, *supra,* p. 9. The federal prosecution was inaugurated[3] on November 4, 1963 before the petitioner was even booked, *supra,* p. 8.

3. Certiorari should be granted to resolve the conflict between the logic of *Preston* v. *United States, supra,* and failure of the courts below to follow it on the facts presented. *Preston* held invalid the search of a motor vehicle which was not contemporaneous with the arrest. There, it was said:

> "The rule allowing contemporaneous searches is justified, for example, by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime—things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control. But these justifications are absent where a search is remote in time or place from the arrest. Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest." 376 U.S., at 367

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[3] The complaint for violation filed Monday, November 4, 1963, alleged that: "Both [Roland and Brown] knew that Jackson's driver's license had been *revoked* and attempted to stop him" (R. 4). Roland and Brown claimed at the trial that they arrested petitioner for driving on a *suspended* license, a different offense. *Falso in uno, falso in omnibus.*

The search of petitioner's car was not justified.[4] The *status quo* with respect to the vehicle could have been

[4] The justification—necessity rationale authorizing warrantless searches of motor vehicles has had a long and uneven development in the courts. In *Carroll* v. *United States, supra*, prohibition agents having probable cause to believe that an automobile traveling on the highway was carrying liquor stopped it; searched it, and found and seized the liquor. Provisions of the National Prohibition Act, as construed by the Court, authorized such warrantless search of moving vehicles on probable cause, although the Act required a warrant for a building search. The *Carroll* Court found this distinction reasonable, in light of (a) the historical circumstance that the early Congresses, at the time of adoption of the Bill of Rights, had authorized customs searches of vessels on probable cause without warrant, and (b) the practical necessity of law enforcement with respect to vehicles, which may move on and disappear before a warrant can be obtained; and *Carroll* sustained the search. *Carroll* itself thus involves a specific statutory authorization of warrantless search, and can be limited to cases in which a legislature has by particular enactment made a finding of necessity for this sort of search; dictum in *United States* v. *Di Re, supra*, 584-586, strongly supports such a limitation; but the Court in *Brinegar* v. *United States, supra*, without discussing the question, applied *Carroll* to sustain a warrantless automobile search on probable cause in a case where no statute authorized such a search. The argument limiting *Carroll* is compelling, but the lower courts are unlikely to take it seriously unless this Court itself agrees to reconsider *Brinegar*. See, e.g., *Armada* v. *United States*, 319 F.2d 793, 797 (5th Cir. 1963).

Preston is grounded upon *Carroll's* necessity rationale. *Preston* invalidated a warrantless search of an immobilized vehicle, impounded; its driver under arrest. See also *Rent* v. *United States*, 209 F.2d 893 (5th Cir. 1954); *United States* v. *Stoffey*, 279 F.2d 924 (7th Cir. 1960). *Preston* requires reconsideration of previous lower court decisions, some of which it has clearly overruled, e.g., *Sirimarco* v. *United States*, 315 F.2d 699 (10th Cir. 1963). *Preston*, also, compels reconsideration of *United States* v. *Rabinowitz*, 339 U.S. 56 (1950). *Preston* revives *Trupiano* v. *United States*, 334 U.S. 699 (1948), overruled at least in part in *Rabinowitz*. *Trupiano* like *Preston* penalizes, in a different factual contex, the omission to obtain a warrant where a reasonable opportunity to do so existed. Unless *Preston* is extended its effect will be to encourage other warrantless on the scene searches.

maintained until a search warrant was obtained. See *Adams* v. *United States,* 336 F. 2d 752 (D.C. Cir. 1964). The officers had perfected the arrest and had petitioner in custody in their own vehicle before the search occurred, *supra,* p. 7. There was no danger of escape or destruction of the fruits of the crime of operating a motor vehicle on a suspended driver's license. Neither was there any probability of an assault upon the officers. Nor can the search be saved on the grounds that the officers had a custodial duty to seize the vehicle as the instrument of the crime of operating a motor vehicle on a suspended license, for the seizing officers were expressly barred by state law from arresting for traffic infractions while patrolling in an unmarked car, *supra,* p. 3. Thus, to sanction the search is to reward official illegality. *Wong Sun* v. *United States,* 371 U.S. 471 (1963).

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Opinion of the Court of Appeals

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21919

WILLIE JACKSON, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the Middle District of Georgia.

(November 16, 1965.)

Before TUTTLE, Chief Judge, BELL and COLEMAN, Circuit Judges.

PER CURIAM: Appellant bases his case here on his contention that the search which produced the illegal whiskey was made in connection with an illegal arrest, and since the search was made without a warrant, it was error for the trial court to admit in evidence the fruits of the search.

The case was tried without a jury and the same evidence was received by the trial court on the merits of the case as was submitted in connection with a motion to suppress the evidence. Since this arrest was made by State officers for offenses against the State of Georgia, its validity must be determined by reference to Georgia law. *Collins* v. *United States*, 5 Cir., 289 F. 2d 129, 131. The general arresting power of officers is provided for in Georgia Code Section 27-207 as follows:

> "An arrest for a crime may be made by an officer, either under a warrant, or without a warrant if the

offense is committed in his presence, or the offender is endeavoring to escape, or for other cause there is likely to be a failure of justice for want of an officer to issue a warrant."

It is claimed by appellant that under the Georgia law an officer may not arrest without a warrant even in the case of an alleged felony upon probable cause. The challenge has more force when the question is whether, under the Georgia law, an officer may arrest without a warrant upon probable cause in the case of an alleged misdemeanor. We do not reach these questions here.

In the trial court the officers testified that they started the pursuit of appellant in his automobile because they recognized him while driving an automobile at a time when they knew his driver's license had been suspended. This would clearly bring the arrest within the language of the Georgia statute since the offense would then be committed in the presence of the officers. Although the appellant argues strenuously that prior conduct of the arresting officers cast considerable doubt upon their testimony that they really arrested Jackson for the violation of the Georgia traffic laws, they did so testify and the trial court made a specific finding of fact that that was the basis of the arrest. We can not, on this record, overturn this finding of fact as being clearly erroneous. That being so, the search that was made of the vehicle at the time the arrest was completed, was permissible under the well recognized authorities. See *Williams* v. *United States,* 6 Cir., 314 F. 2d 795, and *Kelly* v. *United States,* 5 Cir., 197 F. 2d 162.

The judgment is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1965

D.C. Docket No. 8153—Criminal

No. 21919

WILLIE JACKSON, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee.*

Appeal from the United States District Court for the Middle District of Georgia.

Before TUTTLE, Chief Judge, BELL and COLEMAN, Circuit Judges.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

November 16, 1965

Issued as Mandate:

Filed May 11, 1966

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21919

WILLIE JACKSON, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the Middle District of Georgia.

(May 11, 1966)

On Petition for Rehearing

Before TUTTLE, Chief Judge, BELL and COLEMAN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby DENIED.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 219

WILLIE JACKSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (R. 137–139; Pet. App. 1a–2a) is reported at 352 F. 2d 490. The opinion of the district court (R. 121–127) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 1965 (R. 141; Pet. App. 3a), and a petition for rehearing was denied on May 11, 1966 (R. 143–147; Pet. App. 4a). The petition for a writ of certiorari was filed on June 10, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

224-440—66

QUESTION PRESENTED

Whether the seizure of liquor from petitioner's car was lawful.

STATUTES INVOLVED

GEORGIA CODE ANNOTATED, SECTION 27–207:

> *Arrest without warrant.* An arrest for a crime may be made by an officer, either under a warrant, or without a warrant if the offense is committed in his presence, or the offender is endeavoring to escape, or for other cause there is likely to be a failure of justice for want of an officer to issue a warrant.

GEORGIA CODE ANNOTATED, SECTION 68–1707:

> *Marking of official vehicles.* Any motor vehicle which is used on official business by any person authorized to make arrests for traffic violations in this State, or any municipality or county thereof, shall be distinctly marked on each side and the back with the name of the agency responsible therefor, in letters not less than six inches in height. (Acts 1953, Nov. Sess., pp. 556, 605).

GEORGIA CODE ANNOTATED, SECTION 92A–9907:

> *Operation of motor vehicle while license suspended or canceled.* In the event any learner, special learner, operator or chauffeur shall have his license suspended, canceled, or revoked, after being granted, it shall be a misdemeanor punishable as provided by law for such person to operate a motor vehicle upon the public roads or highways within this State, or upon any public street within the limits of an incorporated village, town or city. (Acts 1937, pp. 322,

348; 1951, pp. 598, 603; 1957, p. 457; 1961, pp. 446, 447.)

STATEMENT

In a jury-waived trial (R. 15–16, 95) in the United States District Court for the Middle District of Georgia petitioner was found guilty on two counts of an indictment charging illegal transportation and possession of non-tax-paid whiskey, in violation of 26 U.S.C. 5205(a)(2) and 5604(a) (R. 1–2, 127), and was given concurrent sentences of imprisonment for 18 months on each count (R. 127–128). On appeal (R. 128–130), the conviction was affirmed (R. 141). A motion to suppress evidence seized after petitioner's arrest was denied both after the pre-trial hearing (R. 93) and at the close of the trial (R. 127).

The evidence showed that two city detectives from the vice squad of Macon, Georgia were driving an unmarked police car on patrol on the morning of November 3, 1963 (R. 17, 21–22, 67–68). These officers knew of petitioner's reputation as the head of an illegal whiskey operation and had received reports from a reliable informer that he was using his red and white Ford in such operations (R. 19–21, 23–24, 68–69). The officers also knew that petitioner's driver's license had been suspended for a year (R. 32, 92, 103)—they had been in recorder's court on June 5, 1963, when the suspension had been ordered (R. 32, 103).

On the morning in question (November 3, 1963) the officers saw a man, whom they believed to be petitioner driving his Ford, approaching them in the opposite direction (R. 28–30, 70). When he made a right turn on

Edgewood Avenue and sped up the hill (R. 31), the officers followed, intending that, if the driver was petitioner, they would arrest him for driving without a license (R. 32). Later in the chase, in which the cars reached a speed as high as 70 miles per hour, the officers positively identified petitioner as the driver (R. 57, 75, 105, 114–115). At one point petitioner made a left turn and dropped a cardboard case of whiskey in fruit jars out of the right door. The officers could smell the whiskey after the jars broke on the pavement (R. 42–45, 66, 79–81). Petitioner finally drove the Ford into a field where his car stopped before a pile of concrete blocks. He ran about 15 feet but stopped when the officers called to him (R. 47–48, 60, 84). Petitioner was arrested for driving without a license and was placed in the officers' car (R. 55, 102, 107, 113). The officers then seized 11 gallons of non-tax-paid whiskey in two cases lying on the back floorboard of the Ford (R. 48–49, 65–66, 100–101). This whiskey was admitted in evidence over defense objection (R. 127).

ARGUMENT

The seizure of the whiskey from the back floorboard of petitioner's car was justified in the circumstances of this case, since, at the time of the seizure, the officers had reason to believe that there was contraband in the car. They had information from a reliable informer that petitioner was using his red and white Ford for hauling illegal whiskey, and when they saw petitioner throw a case of whiskey out of his car and could smell liquor from the broken jars as

they drove by, the officers had ample probable cause to believe that petitioner had illegal liquor in the car. This in itself justified the search of the car and the seizure of the whiskey. *Brinegar* v. *United States,* 338 U.S. 160; *Carroll* v. *United States,* 267 U.S. 132.

These decisions teach that contraband may be seized from a vehicle without an accompanying arrest. Hence, no issue is presented here of whether a search of a vehicle is a permissible incident to an arrest for driving without a license. Indeed, the arrest of petitioner for that offense [1] was quite distinct from the seizure at issue here. The fact that the officers saw petitioner driving in apparent violation of Georgia law was a legitimate ground for following him, but it was petitioner's conduct in speeding up his car and throwing out the liquor, together with the other information that the officers had, which justified the search and seizure.

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[1] We note parenthetically that petitioner's arrest was clearly valid, since the officers knew that petitioner's license had been suspended for a year. When they saw him driving on November 3, they knew he was committing in their presence a violation of Section 92A–9907 of the Georgia Code (*supra*, p. 2), and that they had power to arrest him under Section 27–207. There is nothing in the statutes cited by petitioner which required the officers to ascertain that petitioner's license had not been reinstated before they could make the arrest, and petitioner makes no claim that the license actually had been reinstated. Nor is there anything in Section 68–1707 of the Gorgia Code (*supra,* p. 2) to indicate that the legislature intended that the absence of markings on official vehicles "shall render inadmissible in the trial of a criminal case evidence otherwise lawfully acquired" (see R. 126–127).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

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WILLIE JACKSON, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S BRIEF IN RESPONSE TO THE BRIEF OF THE UNITED STATES IN OPPOSITION

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Pursuant to paragraph 4 of Rule 24 of the Rules of this Court, the petitioner files this brief in response to the brief of the United States in opposition to the petition for the writ of certiorari.

STATEMENT

The Government relies heavily upon an inaccurate statement of the facts. It is not clear that petitioner's license was suspended on June 5, 1963 in the recorder's court (Br. 3). A material conflict exists with respect to this issue. Other evidence introduced by the Government shows that the license was suspended on May 31, 1963 (R. 92), and the Government did not avail itself of the opportunity to prove that petitioner's license was actually suspended on the date of his arrest (R. 119). Nor is it true that petitioner "dropped a cardboard case of whiskey in fruit jars out of the right door" and that the officers could smell whiskey emanating from the broken jars (Br. 4). That statement is a mere conclusionary taint placed upon ambiguous testimony. Officer Roland asserted that he could "tell the door opened" and "This case went rolling down the street and glass was breaking and liquid was running in the street" (R. 44). The officers did not stop to examine the liquid substance or to determine whether or not revenue stamps had been affixed to the broken jars (R. 45).

ARGUMENT

1. The Government erroneously urges that the officers had "ample probable cause" for petitioner's arrest (Br. 5). That argument is based upon (a) information from a reliable informant that petitioner transported illegal whiskey and (b) alleged ejection of a case of fruit jars containing illegal whiskey from the car during the chase. First, even if the detectives did in fact rely upon an unidentified informant who was not present at the trial and available for cross-

examination,[1] the information which he allegedly gave could hardly have been reliable, for the same officers over a six-month period had repeatedly stopped and searched petitioner's cars with no results whatsoever (R. 22, 87-93, 103, 110, 112). The revelations of a warrantless search cannot prove the reliability of a nameless informant. Compare *United States* v. *Di Re*, 332 U.S. 581, 595 (1947). Second, on the occasion in question, there is absolutely no evidence that the officers received any information from their informant, reliable or otherwise. The incident occurred at seven o'clock in the morning (R. 22). Third, the claim that probable cause was furnished by one of the officers smelling whiskey from a carton allegedly ejected from the right side of petitioner's two-door sedan, while they were travelling at speeds of seventy (70) miles per hour in a car filled with cigar smoke strains credibility far beyond the breaking point (R. 41, 46). Significantly, none of the jar lids which the officers claimed were shattered upon their ejectment, thus releasing the incriminating scent, were offered in evidence.

The necessity for the existence of probable cause for an arrest to precede the warrantless search of a motor vehicle cannot be avoided by casually characterizing the seized objects as contraband (Br. 4, 5). In all cases where warrantless search has been validated, probable cause for an arrest existed prior to the search.

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[1] When hearsay evidence is an indispensable component to support a finding of probable cause, the Government should, at least, be required to disclose the informant's name. For, without an opportunity to go behind the officer's testimony, fair adversary litigation of what the officer knew when he acted is impossible. See *Roviaro* v. *United States*, 353 U.S. 53, 61 (1957).

Brinegar v. *United States*, 338 U.S. 160 (1949); *Scher* v. *United States*, 305 U.S. 251 (1938); *Carroll* v. *United States*, 267 U.S. 132 (1925). "An arrest is not justified by what the subsequent search discloses." *Henry* v. *United States*, 361 U.S. 98, 103 (1959). More critically, whiskey is not contraband *per se*. It only becomes contraband if the taxes are not paid. There was absolutely no evidence that the officers knew prior to the search and seizure that the containers inside the closed carton in the rear of the car did not have the requisite revenue stamps affixed.[2]

Appellation of the petitioner as "the head of an illegal whiskey operation" (Br. 3) in no way justifies his treatment. Giving petitioner this status has been used to justify repeated and capricious pursuits, arrests, and searches of him and his property over a six-month period. The deprivation of precious constitutional liberties cannot be sustained on the basis of status alone.[3]

The Government's parenthetical contentions (a) that the arresting officers were not required to ascertain whether petitioner's license had been reinstated and (b) that the Georgia legislature has not manifested an intent that the violation of Section 1707, 68 Ga. Code Ann., should render inadmissible evidence offered in a federal prosecution are specious and immaterial. First, a fact, though collateral, is not proved by circumstantial evidence unless the proven facts point

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[2] "Georgia Moonshine" may be purchased in fruit jars over the counter in most retail package stores.

[3] See *Robinson* v. *State of California*, 370 U.S. 660 (1961), condemning punishment of the basis of medical status. *Griffin* v. *Illinois*, 351 U.S. 12 (1955), condemning inequality of treatment on the basis of economic status.

with equal consistency to the hypothesis claimed to the exclusion of all other reasonable hypotheses. Here, the proven facts do not render it more probable than not that petitioner was driving, on the day in question, while his license was in suspension. State law operates to defeat establishment of the critical hypothesis without additional proof. Section 422 (a), 92-A Ga. Code Ann., defines suspension as the *temporary* withdrawal of the privilege of operating a motor vehicle. Reinstatement proceedings and orders are not matters of public record, and there are two methods of reinstating a suspended license, Sections 422, 423, 427.1, 92-A Ga. Code Ann. The arresting officers never even inquired whether petitioner had a license or not, evincing a purpose not to arrest but to search (R. 107, 113, 122). Second, the Government attempts to import (or perhaps, "bootleg") into the area of federal criminal prosecutions inappropriate notions of equitable absention. Vindication of a federal right does not have to await its dis-entanglement from a skein of state law in which it is but incidentally entwined: *McNeese* v. *Board of Ed.*, 373 U.S. 668, 674 (1962). Not only is abstention federally inappropriate, but it is unconscionable, also. No state remedy is even arguably[4] available to adjudicate the issue of whether an arrest in violation of the statute is valid and the two-year state statute of limitations (Section, 601, 27 Ga. Code Ann.) bars even a bad faith prosecution in the state courts (R. 108, 117, 119).

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[4] Section 1707, 68 Ga. Code Ann., has been before the Georgia Appellate courts once. In *Poole* v. *City of Louisville*, 107 Ga. App. 305, 130 S.E. 2d 157, 160 (1963), a civil suit for personal injuries, it was held that the issue of whether pursuit in an unmarked car of a motorist was wanton or not was for the jury.

2. Certiorari should be granted for the further reason that the decision below works an injustice between litigants. Consider *Mondeck* v. *Pan American World Airways, Inc.*, 382 U.S. 25 (1965). The decision below conflicts in principle with other contrary decisions of the Fifth Circuit on facts which are materially analogous.[5] In both *Collins* v. *United States*, 289 F. 2d 129 (1961), and *Rent* v. *United States*, 209 F. 2d 893, 899 (1954), searches and seizures of evidence from immobilized motor vehicles were invalidated on the theory that necessity no longer justified the omission to obtain a search warrant.

CONCLUSION

For the foregoing reasons the petition for the writ of certiorari should be granted.

Respectfully submitted,

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[5] Evidently the panel which decided this case, in a brief *per curiam* opinion, was conscious of this conflict. The motion for rehearing was held under advisement for five and one-half months before it was overruled, without comment, on May 11, 1966.